

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TIMOTHY WHITE,)
)
 Plaintiff,)
)
 vs.) 3:11-CV-1817-B
)
 REGIONAL ADJUSTMENT)
 BUREAU, INC., d/b/a)
 RAB, INC.,)
)
 Defendant.)

PRETRIAL CONFERENCE - VOLUME 1
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
FEBRUARY 25, 2013

A P P E A R A N C E S

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proceedings reported by mechanical stenography,
transcript produced by computer.

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FEDERAL COURT REPORTER - 214.753.2747

1 (In open court at 2:11 p.m.)

2 THE COURT: Good afternoon. For the
3 record, this is Civil Action 3:11-CV-1817-B, White
4 v. Regional Adjustment Bureau, Inc.

5 We are here this afternoon for the
6 pretrial conference in this case. The case is
7 scheduled for trial tomorrow.

8 Let's begin this hearing by having both
9 sides introduce themselves, and I will start with
10 counsel for the Plaintiff.

11 MR. RADBIL: Noah Radbil for the
12 plaintiff, Your Honor, Timothy White.

13 THE COURT: Thank you.

14 MS. MALONE: Robbie Malone, Your Honor,
15 for the defendant.

16 THE COURT: Thank you. All right.
17 Counsel, go ahead and take a seat.

18 I guess my initial observation is some
19 concern over the number of disputes in what doesn't
20 seem to be a very large type case. And it seems
21 like this case has been marked by that for some
22 time; not casting blame on either side, but it is
23 unusual, very unusual.

24 So with that, I've got numerous motions
25 that we need to resolve. Because there were so many

1 and because that was a marked difference from what I
2 am used to in a pretrial, I entered a gavel order
3 with specific directions on Friday to make sure that
4 the parties had fully conferred on all of these
5 motions that were outstanding.

6 So Mr. Radbil, let me just start with you.
7 Are you comfortable that you all have thoroughly
8 addressed the issues and disputes in these motions?

9 MR. RADBIL: Yes, Your Honor. And let me
10 begin by saying I agree with Your Honor, that the
11 number of objections and disputes regarding the
12 pretrial materials in what remains to be fairly
13 straightforward and simple claims I think is
14 unusual.

15 I think the main issues were the repeated
16 objections to experts or potential expert testimony
17 of which we don't intend to present any. We have
18 tried to make clear that we are not going to present
19 expert witnesses, which is why we haven't designated
20 expert witnesses.

21 There was some concern that because some
22 of our possible witnesses possessed Ph.D.s, because
23 Dr. White and his colleagues and people who know him
24 are in the same field and went to school with him,
25 that they would present somehow expert testimony.

1 I tried explaining that those witnesses,
2 although they may be qualified in another case under
3 different circumstances, could testify to facts.
4 Just because you qualify, possess certain
5 qualifications, obviously you don't have to present
6 expert testimony.

7 Notwithstanding, we made a significant
8 concession to move forward expeditiously in dropping
9 from our possible witness list most of those
10 witnesses, with the exception of Jaclynn Cureton --

11 THE COURT: Okay. I want to get into more
12 specifics in a few minutes. I think you have
13 addressed my first question.

14 Ms. Malone.

15 MS. MALONE: Your Honor, obviously I don't
16 think the Court wants to hear who thinks the other
17 side filed more objections.

18 THE COURT: I want to know what happened,
19 Ms. Malone, because this is unusual and --

20 MS. MALONE: All right.

21 THE COURT: -- the Court has a certain
22 obligation to make sure that any -- the course of
23 any of civil litigation pending before it is
24 conducted expeditiously and as cost efficiently as
25 possible. This has not. So I am concerned, and

1 that's why I brought it up. So anything --

2 MS. MALONE: I would be happy to give you
3 a couple -- an explanation from my perspective, Your
4 Honor. Clearly it's my perspective that, after the
5 order was entered on Friday, I made ten calls to
6 Mr. Radbil, sent him ten e-mails, didn't get a
7 response from him. He didn't call me back until
8 Sunday afternoon. So I tried to resolve the issues
9 with him.

10 For example, on the motion to quash, we
11 actually did speak to him. Xerxes Martin from my
12 office called him. Mr. Radbil disagreed with us
13 about that. So we have tried to resolve things with
14 him, but Mr. Radbil and I have just disagreed about
15 the law on some issues.

16 And on the other issues, it's just simply
17 a matter of he thinks you can do certain things that
18 in my 27 years of practice I don't think you can do.
19 I don't think you can name witnesses five weeks
20 before trial and not draw an objection from the
21 other side, which is what has happened in this case.

22 Some of the motions that were filed,
23 Judge, frankly were because your order said to file
24 motions in limine, file objections to exhibits and
25 pretrial. They were probably longer than you were

1 used to because we had some legitimate objections
2 related to experts.

3 And in this particular case, he didn't
4 name just colleagues of Dr. White, he named treaters
5 of Dr. White. Dr. White has a rheumatoid illness
6 called ankylosis spondylosis. He named him on his
7 witness list.

8 Well, I have done a lot of medical cases
9 in my career, both as a medical malpractice defense
10 attorney and just doing some straight PI work on all
11 kinds of cases. And if you are going to put an
12 expert medical doctor on the stand and your
13 description of their testimony is you will offer
14 testimony --

15 THE COURT: Slow down just a little bit.

16 MS. MALONE: I wish I could say I had too
17 much coffee, Judge, but it's in the afternoon. If
18 you were going to put a medical expert on the stand
19 and ask them about causation, that's expert
20 testimony, and I don't believe that's appropriate
21 in -- in a setting where you haven't named experts.

22 Mr. Radbil actually said to me that he
23 believes an expert -- a doctor can testify as to
24 facts, and that's not a requirement of expert
25 testimony. We just disagree on that, Judge.

1 The other stuff, you will actually be
2 pleased to know, we did have a very long
3 conversation yesterday after church -- it was
4 probably a good thing for both of us -- and we
5 worked out quite a bit, Judge. And I think you will
6 be pleased to hear we will move along fast.

7 I don't think the trial will take that
8 long. Mr. Radbil and I have tried a number of cases
9 against each other. We tend to get a little more
10 disruptive in the pleading practice and move trial
11 along pretty quickly.

12 So I think you will be happy to know that
13 will do. If you would like for me -- the first
14 motion was mine, if you want me to start.

15 THE COURT: Slow down. Let me look
16 through and see what I want to look at first.

17 Why don't we talk first about this issue,
18 if you haven't resolved it, with regard to the
19 emergency motion to quash, and that would be your
20 motion, Ms. Malone.

21 MS. MALONE: Yes, Your Honor.

22 THE COURT: So let's go ahead and let me
23 pull it before you start, but come on up to the
24 lectern.

25 MS. MALONE: I have a case, Judge. Could

1 I give that to you now?

2 THE COURT: Go ahead and hand it to
3 Ms. Woodward, if you would.

4 MS. MALONE: I actually have two, if that
5 would be helpful to you.

6 THE COURT: Thanks. Okay. This is -- and
7 I'm taking them not in chronological order, but I
8 want to take this one up first.

9 This is a motion that is document 99, and
10 it's the Emergency Motion to Quash Subpoenas.

11 I have read through the motion, the
12 response, and the accompanying brief. Let me hear
13 from you, Ms. Malone. Please do try to talk slower.

14 MS. MALONE: Yes, ma'am. I apologize.

15 Judge, for your notes, 99 and 100 were the
16 same document. What happened was, when my assistant
17 filed 99, she forgot to click Emergency, and so she
18 refiled it and instead of correcting it -- so the
19 good news is it's actually only one motion.

20 THE COURT: That's good news. Okay.

21 MS. MALONE: And I don't believe there's
22 any response on file to it as of yet.

23 THE COURT: All right. Let's hear your
24 argument on it. So these witnesses are still in
25 issue, in play, as far as potential witnesses?

1 MS. MALONE: It's my understanding
2 Mr. Radbil has not dropped his position on this.

3 THE COURT: Okay. Go ahead.

4 MS. MALONE: The case I brought to you,
5 Judge, is from the 5th Circuit, Fifth Circuit Court
6 of Appeals, and it specifically addresses the issue
7 that we have here. And I would ask the Court to
8 look on page 5 of 7 of the copy I gave you.

9 The Court talks in this section about what
10 you must do when you are subpoenaing a nonparty or a
11 person who is not an officer of a party under Rule
12 45. And with all due respect, Your Honor, the rule
13 and the Fifth Court of Appeals says it has to be in
14 person.

15 THE COURT: I know. I understand all of
16 that. Let me go ahead and tell you where I think we
17 are, at least on this, now that I am understanding
18 it's still fully at issue.

19 Normally, if you have witnesses who have
20 been identified in the course of litigation who are
21 employees for a company on one side or the other or
22 both, they have been sufficiently identified and
23 deposed during the course of litigation, that
24 there's no issue about whether or not the
25 corporation is going to provide them either because

1 they are going to call them themselves or because
2 the other side -- and the other side can then use
3 them or vice versa.

4 So it's usually not a question. Given
5 the, what appears to be acrimony from the papers in
6 this case, it seemed to me this was perhaps another
7 dispute along those lines. So with that in mind, I
8 understand what the case authority is.

9 Let me ask you this about these particular
10 witnesses. I understand -- and I want to hear
11 Mr. Radbil's position on this -- that these are
12 employees, at best, but not parties and not such
13 that they can speak for the corporation.

14 MS. MALONE: Yes, ma'am.

15 THE COURT: Okay. Have these people been
16 deposed or identified as witnesses in the case?

17 MS. MALONE: They were identified in our
18 requests for disclosures in December of 2011.
19 Routinely we identify every employee's name that may
20 appear in the records.

21 There was no request for their deposition
22 from Mr. Radbil, so they were never deposed. We
23 listed them as possible only on our pretrial
24 disclosures because we had to do that about a month
25 out from trial, Your Honor.

1 Occasionally, the corporate representative
2 becomes sick or whatever, so we just listed them on
3 the off-chance that he would not be available so we
4 could have a fallback, which would be an employee
5 whose name appeared in the account notes and who had
6 some reference.

7 The thing that you should know about this
8 that's different than those other cases is that
9 these individuals -- it has to do with debt
10 collection, Judge. They don't remember these calls.
11 They have no recollection of anything. The only
12 thing they would do would be to read the account
13 notes, which we both offered into evidence and which
14 we have a corporate rep to come in and explain to
15 the jury.

16 THE COURT: Okay. Ms. Malone, I
17 understand your position, and I understand what the
18 law is. Now that I understand what happened, I want
19 to hear from Mr. Radbil on this.

20 MS. MALONE: Can I address the issue on
21 fees, or are we coming back to that later?

22 THE COURT: We will talk about that later.
23 Mr. Radbil.

24 MR. RADBIL: Thank you, Your Honor. In
25 the pretrial disclosures of the defendant, they

1 identified the same five employees who may have
2 knowledge regarding the efforts in question to
3 collect a debt from the plaintiff.

4 One of the employees in particular, Karen
5 Nelson, is the one who allegedly threatened to strip
6 him of his degrees, his Ph.D., essentially his
7 family's livelihood. A mere statement that she
8 doesn't remember doesn't replace her testimony on
9 that issue.

10 THE COURT: Mr. Radbil, let me interrupt
11 you.

12 MR. RADBIL: Of course.

13 THE COURT: Because, be that all as it
14 may, the defense is correct. Again, I said, my
15 presumption, which has been the norm over many
16 years, is that these issues are already hashed out
17 by the time you get to trial. And with
18 corporations, everyone agrees who is going to bring
19 employees from where. I assumed that was what the
20 situation was here, and it's not.

21 So the Court has no authority to order
22 these people to come here pursuant to Rule 45 or any
23 other rule under the circumstances as I understand
24 them. So even if they are key witnesses, it's too
25 little too late as far as I see. If you have some

1 legal exception, you can tell me, but I am not aware
2 of any of authority that would allow the Court to do
3 what you are asking.

4 MR. RADBIL: I think the Court issued an
5 order in response to the plaintiff's objections
6 to --

7 THE COURT: Right, and I issued that order
8 because at the time I understood the situation was
9 likely as I described it, and it is not. The Court
10 was incorrect about that.

11 MR. RADBIL: Okay. That changes things
12 considerably of course.

13 THE COURT: Mr. Radbil, these are issues
14 that the Court should not have to educate you about
15 at this stage of the proceedings.

16 MR. RADBIL: They don't. Your Honor
17 doesn't have to educate me. The order said for them
18 to agree to accept service or produce the witnesses,
19 and they agreed to accept service, so we served
20 those subpoenas in accordance with the order. So
21 that's why we didn't take any further action.

22 THE COURT: What action would you be
23 taking to get them here? What possible action could
24 you take?

25 MR. RADBIL: We could have shown a need

1 for their testimony.

2 THE COURT: There's no legal authority to
3 get them here under these circumstances. So you
4 can't say that you relied on the Court's order to
5 presume these witnesses would be here. That's just
6 not good enough, Mr. Radbil. These are people
7 who -- again, I don't have the authority to order
8 them here.

9 MR. RADBIL: Then would Your Honor -- can
10 we then stipulate that Dr. White's testimony cannot
11 be contradicted on the issue because nobody, quote,
12 remembers what happened except for Dr. White.

13 THE COURT: I'm not sure what you are
14 asking me.

15 Let me ask you this: Are you claiming
16 that these witnesses, that they weren't disclosed
17 properly in the course of discovery?

18 MR. RADBIL: No. I'm claiming that I was
19 confused about the Court's order and how it affected
20 our need to take any action. Here's my concern --

21 THE COURT: What action would you have
22 taken is my question?

23 MR. RADBIL: We would have shown the Court
24 the need to have that witness present and that that
25 witness was material. And I think the Court has

1 discretion --

2 THE COURT: Under what authority?

3 MR. RADBIL: Under Rule 45 I think.

4 THE COURT: Do you have any cases on that?

5 MR. RADBIL: No, Your Honor, I do not have
6 cases with me. But the 5th Circuit case that
7 Ms. Malone handed you involved no tender of any
8 travel fees. Where, in this case, we served them
9 through accepted service and tendered travel fees
10 and appropriate witness fees.

11 But my main concern -- and I understand
12 the Court's position. My main concern is that
13 Dr. White will testify that Ms. Nelson made certain
14 threats and took certain actions. And I don't want
15 there to be a negative inference because Ms. Nelson
16 is not here to testify, so. . .

17 THE COURT: Why didn't you take her
18 deposition? Why didn't you depose her by a Rule 45
19 subpoena served upon her in the district where she
20 resides?

21 MR. RADBIL: Frankly, to save costs
22 because I thought the case would settle, and it
23 hasn't.

24 THE COURT: Mr. Radbil, there is nothing I
25 can do at this point. If you were to tell me that

1 these were key witnesses that weren't disclosed on
2 time that you were surprised by and that perhaps a
3 continuance to take their depositions would change
4 things, but that's not what I'm hearing. I'm not
5 hearing that you have been surprised by these
6 witnesses or that they have pulled them out at the
7 last minute as surprises.

8 And I mean, the only way to have their
9 testimony conceivably, as far as I can see, is
10 through a subpoena for a deposition. But we are way
11 too along in this 2011 case to do that, unless you
12 have some basis that the Court could even consider
13 that option.

14 MR. RADBIL: I don't on hand. May I
15 request a leave of court this afternoon to research
16 the issue in depth? Otherwise, I respect the
17 Court's decision on that issue. I think we can work
18 through it and Dr. White's testimony would
19 suffice -- pardon me.

20 THE COURT: No. Go ahead.

21 MR. RADBIL: If there is clear authority
22 for what has been done and the order that has been
23 issued and because we have acted in accordance with
24 that order, I would like to submit any such
25 authority for the Court's consideration,

1 notwithstanding that I respect the Court's --

2 THE COURT: Mr. Radbil, this is something
3 that should have been done by now. Regardless of
4 the Court's language in directing them to serve
5 subpoenas, it doesn't change anything because you
6 still wouldn't -- even if I gave you another month
7 on this case or longer, you still couldn't get these
8 people here for trial under Rule 45. You do
9 understand that.

10 MR. RADBIL: Yes. Well, I do now. My
11 understanding was that counsel accepted service. In
12 fact, I called counsel to confirm, are you going to
13 produce them, or are you accepting service on their
14 behalf? And counsel said, I am accepting service on
15 their behalf pursuant to the order. So we tendered
16 the fees and everything.

17 Again, I don't think that it's a make or
18 break issue in terms of this trial, and I'm willing
19 to work through for efficiency sake and let that
20 issue go. However, if there is some clear
21 authority, I just would request the opportunity this
22 afternoon for leave to submit that authority. If
23 Your Honor doesn't want to grant that leave, that's
24 okay, too.

25 THE COURT: The emergency motion to quash

1 was filed on the 20th. So at least you've been on
2 notice of that at least since the 20th --

3 MR. RADBIL: But --

4 THE COURT: -- as I mentioned. The Court
5 has no legal authority to order these people here
6 under Rule 45. There are numbers of cases that talk
7 about this issue.

8 As I mentioned, I assumed that this was
9 not a situation like that. I incorrectly assumed
10 that this was a situation where everyone agreed at
11 this late stage of the case as to who from the
12 corporation, employees or not, would be provided. I
13 was incorrect about that, but I agree with the
14 defense counsel.

15 And just to cite a couple of cases along
16 those lines, the -- there's a Law Review article on
17 this. It's an older Law Review article, but it
18 talks about procuring trial testimony from corporate
19 officers and employees. It's a note about
20 suggestions for reform, but it talks about this very
21 issue and the Court's lack of authority under Rule
22 45, and specifically it takes up this issue in
23 depth. It's 25 Akron Law Review 571, Spring 1992.
24 It cites to several cases for the proposition that,
25 as they set forth: It is clear that a court cannot

1 compel an individual who is beyond the Court's Rule
2 45 subpoena power to testify at trial as an
3 individual.

4 Again, it cites several cases along those
5 same lines: One out of the 5th Circuit many, many
6 years ago, Degelos, D-E-G-E-L-O-S, v. Fidelity and
7 Casualty, 313 F.2d 809 at 814, 5th Circuit 1963.
8 And other cases where this has been addressed more
9 recently, out of the Southern District of New York,
10 Aristocrat Leisure, Limited, v. Deutsche,
11 D-E-U-T-S-C-H-E, Bank and Trust Company, 262 F.R.D.
12 293, Southern District of New York, 2009; another
13 case out of the Southern District of Ohio, Novovic,
14 N-O-V-O-V-I-C, v. Greyhound Lines, Inc, it's a 2012
15 Westlaw case. Westlaw number is 252124, and that
16 opinion came out January the 26th of this year. And
17 it goes through and addresses the issue of the
18 Court's lack of authority under Rule 45 to compel
19 corporate employees who aren't directors, officers,
20 or managing agents to appear.

21 And finally, a case out of the Northern
22 District of Iowa, and that would be Ferrell,
23 F-E-R-R-E-L-L, v. IBP, and that is a Westlaw case,
24 as well, a 2000 Westlaw case, 34032907,
25 April 28th of 2000.

1 MR. RADBIL: Thank you very much, Your
2 Honor. May I respond very briefly?

3 THE COURT: Go ahead.

4 MR. RADBIL: If there are more cases, I
5 would certainly like --

6 THE COURT: Go ahead, I'm listening.

7 MR. RADBIL: Then we would stipulate,
8 hopefully, that these witnesses are unavailable for
9 the purposes of the hearsay rule.

10 THE COURT: And what would you be asking
11 in that regard?

12 MR. RADBIL: That Dr. White would be
13 permitted to testify about conversations between
14 himself and Karen Nelson, in particular, who is one
15 of these unavailable employees.

16 THE COURT: Okay. That seems more of a
17 trial objection than it does anything else. I'm not
18 sure if this is the time to rule on that, but let's
19 go ahead and hear what Ms. Malone has to say. You
20 want to take a seat?

21 MR. RADBIL: Certainly.

22 THE COURT: Thank you.

23 MS. MALONE: Your Honor, without actually
24 hearing the testimony, I agree with the Court. I
25 think that's more properly brought up at the time.

1 I don't think that that's what unavailable means in
2 terms of the hearsay rule.

3 The records, themselves, are going to be
4 offered in as a business record exception, so
5 certainly that testimony will be there. I think he
6 is -- I'm not sure what question he's asking that he
7 thinks he's going to get hearsay in. There are some
8 hearsay exceptions that would allow him to get
9 certain testimony, but without having a context, I
10 don't know -- I'm sorry, Judge.

11 THE COURT: If I go like this, it just
12 means slow down, for all of us. Okay?

13 MS. MALONE: Without a context, I can't be
14 any more specific than that, except that they
15 clearly would fall, the account records would fall
16 under the business record exception, and that's
17 actually one of the exhibits we both agreed to.

18 THE COURT: Okay. Mr. Radbil, all I can
19 tell you right now is that I'm not going to rule on
20 that one way or the other. I think you ought to get
21 some research together to support your position that
22 those kinds of questions are proper and fall within
23 the limits of the Federal Rules of Evidence. So
24 that's all I can tell you right now on that.

25 MR. RADBIL: I will certainly be prepared

1 for that. And I will just add that Dr. White's
2 deposition was taken, and his testimony shouldn't
3 deviate from, you know, his prior statement. So to
4 the extent -- well, I will prepare that issue for
5 trial, Your Honor.

6 THE COURT: Were there objections to that
7 testimony about him talking about what people said
8 to him on the phone?

9 MR. RADBIL: I don't believe so, Your
10 Honor. I think those questions were asked by
11 defense counsel.

12 THE COURT: Okay. All right. Thank you.

13 So the emergency motion to quash the
14 depositions of the defendant's employees is granted
15 for the reasons I have stated, and that is document
16 99.

17 Okay. Let's move on, then, to the next
18 area and see where we are with regard to these -- to
19 the evidence and the testimony of this case. Give
20 me just a minute here.

21 Document 65 is this motion with regard to
22 plaintiff's unnamed experts; and then 75 is the
23 supplement to the motion to exclude unnamed experts.

24 Let me just turn directly to you,
25 Ms. Malone, and tell me if I'm clear where we are on

1 these. Are these still in issue or not?

2 MS. MALONE: I don't believe so, Your
3 Honor. I think we actually worked that part out,
4 which is that he has removed the treating healthcare
5 providers from his possible list. So I think that
6 resolves the problem for us.

7 THE COURT: Mr. Radbil, do you agree with
8 that?

9 MR. RADBIL: I agree that the problem has
10 been resolved. And I think to the extent that
11 anybody's testimony crosses the expert threshold,
12 objections at trial would be appropriate. But I
13 disagree with the fundamental basis of the objection
14 that, just because you possess a Ph.D., you can only
15 testify as an expert. I think certainly somebody
16 who possesses a Ph.D. in any type of case could
17 testify that the sky was blue or it was raining,
18 certain facts.

19 THE COURT: Ms. Malone, is that the basis
20 of your objection?

21 MS. MALONE: No, ma'am, his description of
22 their testimony was damages and causation. And I
23 believe under RMS v. Elston for his Texas case and
24 just straight up Daubert, Judge, if an expert, a
25 medical provider gets on the stand and offers

1 testimony on causation, that's expert testimony.

2 THE COURT: Okay. Are we clear on this,
3 Mr. Radbil?

4 MR. RADBIL: We are. There is no intent
5 to offer causation testimony from a medical
6 standpoint, and we have withdrawn witnesses that
7 would testify on those grounds. The problem is
8 resolved.

9 THE COURT: So document 65 and 75, as well
10 as the response, which is document 90 -- and it
11 seems that there's another document, 96, by the
12 defendants all on the same issue, those are no
13 longer at issue in this case. Agreed, Mr. Radbil?

14 MR. RADBIL: I agree.

15 THE COURT: Ms. Malone?

16 MS. MALONE: Yes, ma'am.

17 THE COURT: Okay. Okay. I have next
18 document 77, filed by plaintiff objecting to the
19 Regional Adjustment Bureau's first amended pretrial
20 disclosures.

21 Let me ask you, Mr. Radbil, is that still
22 at issue?

23 MR. RADBIL: The first part, Your Honor,
24 was about the five employees, which has been
25 resolved this afternoon.

1 The second part relates to a request for
2 an in-camera inspection, specifically of the account
3 notes. That's the only concern that I have, is that
4 there are almost as many pages of the account notes
5 that are redacted as those which are not in there,
6 entire pages. No privilege log was produced. So to
7 the extent those five witnesses are not available, I
8 think the account notes take on a significant
9 import.

10 So all I request is that an in-camera
11 inspection of these several pages, that may be nine
12 or ten pages, just to make sure that nothing
13 inappropriate has been redacted.

14 We have requested unredacted copies, and
15 we have been denied. But I think that it would be
16 fair if the Court would oblige to just take a peek
17 at these few documents to see what was actually --

18 THE COURT: Have you not had these
19 available to you during the discovery of this case?
20 Is this the first time you have seen this?

21 MR. RADBIL: I tried to ask about the
22 redactions during depositions, and there was
23 objections on privilege grounds, but there wasn't
24 any substantive information provided.

25 THE COURT: So you have had these

1 documents that you are objecting to, the redactions,
2 during the pretrial phase of this case before just
3 the disclosures.

4 MR. RADBIL: I think -- yes, yes.

5 THE COURT: And did you file a motion to
6 compel or anything of that nature to try to require
7 that the redactions be unredacted?

8 MR. RADBIL: I don't believe we did, Your
9 Honor.

10 THE COURT: Okay. So this particular
11 issue is -- is just now coming up, this issue of you
12 trying to get what happened -- what was underlying
13 the redactions.

14 MR. RADBIL: I think we had a hearing --
15 there was two depositions. One was because -- the
16 second deposition was ordered by the Court because
17 parts of the contract under which the collection
18 efforts were performed wasn't produced. And because
19 it wasn't produced, I couldn't ask questions
20 regarding that. And I think I objected -- I can't
21 remember whether or not I did -- to the redactions
22 in the account notes during that hearing, as well.

23 But to be fair, I don't think it's much of
24 a burden on any party or the Court to just take a
25 look and see what was redacted. If everything is

1 redacted --

2 THE COURT: Mr. Radbil, let me just say
3 that there's got to be a legal mechanism for what
4 you are asking the Court to do. In-camera
5 inspections are not something that we do regularly
6 here or summarily. So regardless of the burden,
7 it's just not something that the Court is just going
8 to do because someone asks. There's got to be some
9 legal authority or mechanism to, first of all, lodge
10 this objection at this phase and then for the Court
11 to conduct an in-camera inspection.

12 What I am understanding you to say is that
13 you have had these redacted documents for some
14 time -- that's what I'm understanding -- and did not
15 file a motion to compel to bring the issue to the
16 Court's attention during the pretrial phase. That's
17 what I'm hearing you say. Am I correct about that?

18 MR. RADBIL: Yes, although I'm not
19 100 percent sure whether our motion to compel
20 included the redactions to the account notes. But
21 the reason that I think it becomes more important
22 now is because these five employees are not going to
23 be here. So if there's anything concerning these
24 five employees, those redacted portions, I think
25 that it would be fair to just make sure that's

1 disclosed. Or if there's not, then, we're certainly
2 ready to proceed on the account notes as they are.

3 THE COURT: Again, I think you've got to
4 advise the Court of the legal basis for requesting
5 this redaction. So far I haven't heard one. I
6 think if you had objected or brought this to the
7 attention -- brought this to the attention of the
8 Court or the magistrate judge through an order of
9 reference and then it was compelled and you still
10 ended up with redacted documents on the pretrial
11 disclosures, then you probably have a reason under
12 Rule 37 to request the Court's intervention, but I
13 haven't heard that.

14 So let me hear from Ms. Malone on this and
15 see if we can't resolve this and move on to the next
16 motion. Thank you.

17 Ms. Malone.

18 MS. MALONE: Sure. Your Honor, the
19 redactions in this particular set start at the point
20 that my client received his law firm's demand letter
21 to RAB, putting them on notice of there being a
22 lawsuit. At that point, everything after that is
23 anticipation of litigation.

24 In this case, Your Honor, to be honest
25 with you, there are no notes of any of substance.

1 What occurred is, because this was a Texas
2 Guaranteed Student Loan debt, they continued to
3 process interest. So really, everything after this
4 page frankly is all interest. I told Mr. Radbil
5 that.

6 I also raised the objection in both our
7 answers to discovery and in the deposition that, at
8 the point that they were on notice of the lawsuit,
9 that's anticipation of litigation, and we redacted
10 everything after that.

11 The truth is, in this case -- sometimes
12 there will be notes about a lawsuit that occurred.
13 In this case, there weren't any. It's just that the
14 interest on the student loans continued to accrue.
15 But since we always take that position, we try to be
16 consistent across for those clients so they don't
17 waive it in another suit, and that's really it.

18 THE COURT: And the exhibit is for what
19 purpose?

20 MS. MALONE: It's the account notes, Your
21 Honor, where the collectors would make entries of
22 attempts to reach Mr. White; their notes that were
23 made simultaneously at the time that they have
24 communications with him; and it is an interface with
25 the Texas Guaranteed Student Loan Corporation. So

1 the student loan people would send in, through some
2 electronic interface, any change to the interest
3 amount that's due, and it's just an ongoing thing.
4 Student loans are different.

5 THE COURT: These are your client's
6 documents and your exhibits. Are you planning to
7 make any issue of the redaction?

8 MS. MALONE: No, ma'am.

9 THE COURT: Mr. Radbil, anything else on
10 this point? And let's make sure we are clear on
11 which exhibit that is.

12 MR. RADBIL: It would be Plaintiff's 6.

13 MS. MALONE: And Defendant's 1, Your
14 Honor. It's the same exhibit.

15 THE COURT: Mr. Radbil, anything else on
16 this?

17 MR. RADBIL: Briefly, Your Honor.

18 THE COURT: Okay.

19 MR. RADBIL: So these documents were
20 originally produced by the defendant, Regional
21 Adjustment Bureau, as Bates label 001 to 041. And
22 there are -- from page 28 through 41, everything is
23 redacted. So to the extent that it just has to do
24 with interest, I don't think that that's privileged
25 matter.

1 And my other concern is that RAB 0215 is
2 also a one-page version of the account notes that
3 contains slightly different information.

4 THE COURT: Okay. Why -- the redactions,
5 are you seeking those because you want to use them
6 as an exhibit?

7 MR. RADBIL: I want the complete document.

8 THE COURT: This is clearly a matter that
9 should have been addressed by you pretrial by a
10 motion to compel. I haven't heard anything where,
11 on this particular point, the defense has violated
12 the Rules of Civil Procedure, the discovery
13 obligations and --

14 MR. RADBIL: No privilege --

15 THE COURT: -- so I haven't heard that.
16 And pretrial is usually not the time where those
17 things are raised unless something, in fact,
18 violative of those discovery disclosure provisions
19 has shown up as an exhibit for trial, but I don't
20 see that here. So I'm going to overrule your
21 objection on that point.

22 Go ahead. I will let you make one more
23 statement on it, and then we will move on to the
24 next one.

25 MR. RADBIL: I respect the Court's ruling,

1 of course. My only other statement would be that I
2 don't believe a privilege log was produced. And in
3 the absence of the five witnesses, again, I think
4 there's more importance placed on the account notes,
5 because Kara Nelson and the others, whose actions
6 are documented here, and the parts not redacted,
7 will not be able to testify as to whether
8 conversations occurred during the periods of
9 redacted time.

10 THE COURT: These are all issues that
11 should have been resolved during the pretrial
12 discovery process or long before today. The
13 five-witness issue, as I mentioned, that's occurring
14 because you didn't -- again, the Court has no
15 authority to do that, and you haven't provided me
16 any authority to allow you to get those witnesses.
17 So I think it's counsel's own actions that are --
18 and the law that are precluding those five witnesses
19 from coming.

20 So, again, there was no motion to compel.
21 You are talking now about a discovery privilege log,
22 and these are all issues that should have been
23 raised before. So the objection that is contained
24 in document 77 is overruled.

25 Let's move, then, to -- this will be

1 document 76. And these are objections by the
2 defendants to the plaintiff's first supplemental
3 Rule 26(a) disclosures.

4 Ms. Malone, why don't you come up and tell
5 me where we are in this particular objection.

6 MS. MALONE: Yes, ma'am.

7 Your Honor, some of it has been resolved,
8 because he's narrowed it down to just the two
9 witnesses. In the case of both Ms. Cureton and
10 Mr. Wilson, those individuals were never identified
11 to us during the discovery process. We heard about
12 them for the first time on January 18th of this
13 year. We obviously had already deposed Mr. White.
14 The discovery cutoff was September of last year. So
15 these two individuals are named for the very first
16 time.

17 In his response, Mr. Radbil says that,
18 because in an interrogatory Mr. White indicated that
19 he had worked at Texas A&M, that should have put us
20 on notice that potential employees of Texas
21 A&M-Commerce would be witnesses.

22 Frankly, Judge, that makes no sense to me.
23 I don't think that he really wanted us to call up
24 this man's former employer and ask if anybody
25 thought they might be coming as a witness. So

1 that's our response to Ms. Cureton. We never knew
2 of her existence. We did not know -- she was never
3 identified by name in any discovery.

4 Mr. Wilson was also never identified by
5 name until January the 18th, and that is more than
6 four months past the discovery cutoff.

7 We also have objections to some of their
8 exhibits that were produced after the discovery
9 cutoff. Do you want me to stop?

10 THE COURT: Let's talk about the witnesses
11 first. We are talking about a Ms. Cureton and a
12 Mr. Wilson, is that right?

13 MS. MALONE: Yes, ma'am.

14 THE COURT: Let's go ahead and let me hear
15 from Mr. Radbil on those witnesses, and then we will
16 talk about exhibits.

17 MR. RADBIL: Ms. Cureton and Mr. Wilson
18 were disclosed under Rule 23 -- 26(a)(3) with all
19 pretrial disclosures on March 7th or 11th, but --

20 THE COURT: March 7th or 11th of?

21 MR. RADBIL: I'm sorry, they were not
22 disclosed in formal responses to written discovery
23 requests, but they were timely disclosed as
24 witnesses in the pretrial disclosures.

25 THE COURT: Which was filed when?

1 MR. RADBIL: In January of this year, I
2 believe.

3 THE COURT: So how do you respond to
4 Ms. Malone's position that they are surprised by
5 this and they haven't been previously disclosed such
6 that they could order -- move for a deposition?

7 MR. RADBIL: Well, Ms. Malone did depose
8 Dr. White. And Dr. White did say in his deposition
9 that he had talked to friends of his about, I
10 believe, the actual damages in the debt collection
11 activities and the problems that he had suffered as
12 a result. And she inquired into the medical
13 providers and physicians at length, but she never
14 got back to the friends or asking Dr. White to
15 identify them.

16 We weren't planning on springing these
17 out. Only in preparing with my client for pretrial
18 did I discover them myself. So as soon as we did,
19 we disclosed them. They are listed as possible
20 witnesses and would probably be used as rebuttal
21 witnesses.

22 Again, they are not -- they are not key,
23 and the case certainly doesn't hang on their
24 testimony. But because they are going to testify
25 about one very narrow thing, which is, you know,

1 what type of shape he was in, basically. And they
2 are not going to testify about what caused that,
3 they are just going to corroborate his testimony as
4 to, you know, his condition.

5 THE COURT: Ms. Cureton, identify her.
6 What is her occupation? What is her --

7 MR. RADBIL: She was a student of
8 Dr. White's when he was teaching while earning his
9 Ph.D. And she witnessed -- and I believe asked --
10 on several occasions what was wrong with him, what
11 was bothering him and noticed the condition he was
12 in.

13 I don't believe that Dr. White ever
14 explained to her the cause, and that's not why we
15 identified her as a witness.

16 THE COURT: And then Mr. Wilson, what's
17 his --

18 MR. RADBIL: He's a next-door neighbor.
19 And Dr. White was having a panic attack in his car
20 one evening, and it was apparently so loud that his
21 neighbor came out to check if he was okay and asked
22 Dr. White, you know, what was going on.

23 THE COURT: Okay. And you agree that
24 these weren't disclosed until the pretrial
25 disclosures in January of 2013.

1 MR. RADBIL: I do, Your Honor.

2 THE COURT: Let me hear back from
3 Ms. Malone on this. Thank you.

4 MS. MALONE: Your Honor, I think Rule 37
5 is pretty clear. In this case that you haven't
6 identified somebody during discovery, you have an
7 affirmative duty to go out and put those names if
8 you intend to use them at trial. He could have
9 supplemented them any time before September 24th of
10 2012, which was the discovery cutoff, and he did
11 not. I do think this is a surprise and an issue.

12 I asked him what Mr. Wilson's job was,
13 because if he has a degree of some kind, like, I
14 don't know, a psychologist, then his description of
15 a panic attack may have more weight than if he's a
16 an accountant, for example. And Mr. Radbil told me
17 he didn't know the answer, which I believe.

18 But Ms. Cureton actually is a graduate
19 assistant in applied psychology. And I can imagine
20 describing that she saw him in the course of a
21 psychology setting would give the jury the
22 impression that she had some basis of knowledge to
23 describe events that would give it more weight, more
24 than is perhaps appropriate.

25 I would have deposed any experts that I

1 thought he was really going to bring to trial if he
2 had named them in June or if he had named them at
3 any point and I thought they fit in that category.
4 I didn't know about them until January of this year,
5 Your Honor, and I do think that's a problem.

6 THE COURT: Let's just talk about for a
7 minute their ability to testify, just about their
8 lay observations of his physical condition. You
9 have talked about experts. Talk about that.

10 MS. MALONE: Well, Your Honor, this is the
11 thing: He says that Mr. Wilson is going to testify
12 that Mr. White was in a panic attack. In the DSM,
13 which is the diagnostic manual, they describe panic
14 attacks in a very specific way and talk about
15 certain symptoms. I don't know how you get around
16 the hearsay. Because for someone to understand what
17 a panic attack is, the person has to say something
18 to them to be able to articulate what the fear is or
19 what's going on inside of them to describe the
20 panic. I don't know how you get around the hearsay
21 rule on that issue.

22 And I think his testimony, what he said
23 Ms. Cureton was going to testify to, was that she
24 asked Dr. White what was going on and kept
25 questioning him about what his condition was.

1 That's all hearsay, Judge. I mean, I don't see how
2 he gets that in.

3 If they were to testify, oh, I saw him and
4 he was crying, okay, but what's the relevance?

5 THE COURT: Okay. But my question is --
6 it's really a lot more basic than your answer.

7 MS. MALONE: Oh, sorry.

8 THE COURT: It's just, as I am
9 understanding, you are surprised on the basis of
10 this potential expert testimony as well as if they
11 were simply qualified as fact witnesses; is that
12 correct?

13 MS. MALONE: A little bit, yeah, Judge.
14 Because of Ms. Cureton's background in psychology
15 and because I don't know who Mr. Wilson is -- and
16 when I Googled that name, it came up with some
17 degreed folks that have the background that could
18 give some weight to that. So in this case that is
19 true.

20 THE COURT: If I direct that they make
21 themselves available for you to interview them or
22 even depose them before they testify, what is your
23 position on that?

24 The reason I ask is, when the Court is
25 confronted at pretrial with an issue of an

1 undisclosed witness or exhibit, there is a balancing
2 that what we look at as to, why wasn't it disclosed;
3 what is the effect on each side, generally; can the
4 prejudice, if there is prejudice, be cured by a
5 continuance or some interviews. I'm not saying how
6 you should answer these questions, but I think the
7 record should be clear on your answers to those
8 questions.

9 MS. MALONE: Your Honor, at this point in
10 the game, where I would have no real ability to do a
11 real background check on them, just giving me the
12 opportunity to interview them is probably not going
13 to be enough.

14 I also would have a concern that I
15 wouldn't be able to check into Ms. Cureton's
16 psychology degree and what's going on in that
17 situation. And there are some rules about
18 psychologists not being able to have a dual
19 relationship that I would explore if I thought she
20 was getting into an area of rendering an opinion.

21 If the Court wants me to do an interview,
22 the truth of the matter is, I don't think it will
23 give me enough at this late stage.

24 THE COURT: I think that answers my
25 question. Let me see if Mr. Radbil has anything on

1 these witnesses, and then we will talk about the
2 exhibits.

3 MR. RADBIL: The reason they weren't
4 disclosed is because, as I was preparing my client
5 for pretrial -- and I was somewhat surprised that
6 there were additional people, also. I asked the
7 client many questions and reviewed the entire case
8 file.

9 Without getting into the subject matter of
10 our discussions, these witnesses came out and we
11 disclosed them as soon as possible.

12 THE COURT: I'm sorry. I couldn't hear
13 the last thing you said.

14 MR. RADBIL: These witnesses came to
15 light, and we disclosed them quickly. There was a
16 month or so that the defense counsel could have
17 moved to depose them or request additional
18 information. We provided phone numbers, home
19 addresses and such.

20 But again, I don't think the case is going
21 to turn on them. So if it's going to be a choice
22 between a continuance versus excluding them, I think
23 Dr. White can testify certainly about whether or not
24 his neighbor saw him in his car at one point doing
25 something or other. I don't think -- I think the

1 testimony is going to be very simple, but not
2 expert.

3 THE COURT: Okay. I think that as far as
4 your case in chief that the defense has properly
5 supported the basis under Rule 37 and our federal
6 discovery provisions for excluding them as
7 witnesses. Because they, from what I can see, a
8 student and a neighbor, are clearly people who the
9 plaintiff knew about. This isn't someone he just
10 discovered. These are people that he has obviously
11 known about for some time. And when I balance all
12 of the factors, it seems that, looking at the case,
13 their importance to the case, that they should be
14 excluded because they weren't disclosed in
15 compliance with the rules.

16 To the extent something opens up their
17 potential testimony as rebuttal witnesses, that's
18 always still a possibility. But I wouldn't want you
19 to take this ruling as some indication that I am
20 going to agree that what Dr. White potentially is
21 going to testify about with regard to them is
22 admissible. But I do think that the defense has
23 supported their motion to exclude them because they
24 weren't disclosed in compliance with the Rule, and a
25 continuance or an interview of them isn't going to

1 cure that.

2 MR. RADBIL: And we expected, I think,
3 that type of ruling so. . .

4 THE COURT: Okay. Let's talk about the
5 exhibits. And I will go back to Ms. Malone about
6 the exhibits that you had some concerns about, and
7 those are identified in document 76?

8 MS. MALONE: Yes, ma'am, beginning on page
9 10 --

10 THE COURT: Okay.

11 MS. MALONE: -- are my objections. The
12 first five exhibits offered by Mr. Radbil, I can
13 lump together.

14 Mr. Radbil is attempting to offer the
15 actual, physical depositions and the errata sheets
16 of the parties. And Your Honor, I don't think
17 that's proper to put the deposition testimony itself
18 to go back to the jury. Can you use it as a
19 demonstrative tool? Perhaps. I mean, obviously
20 there may be an objection. Our objection is that
21 the actual depositions, themselves, would not be
22 admissible to the jury.

23 THE COURT: And that's Plaintiff's
24 Exhibits 1 --

25 MS. MALONE: 1 through 5.

1 THE COURT: Mr. Radbil?

2 MR. RADBIL: Yes. Your Honor, Exhibit 1
3 is Dr. White's deposition; Exhibit 2 is RAB's
4 deposition by and through designated representative
5 Robert F. Wyatt; and then there is an errata page,
6 which is Exhibit 3, with no changes; and then there
7 is a second deposition that was compelled by the
8 order of the magistrate of Robert F. Wyatt, which
9 took place on September 6, 2012; and Number 5 is the
10 corresponding errata page.

11 Those will be used for impeachment
12 purposes. It is my understanding that we are
13 required to list deposition testimony and
14 depositions as exhibits. If the witness is
15 impeached with a portion, we may attempt to offer
16 that portion as an exhibit, but . . .

17 THE COURT: Let me clarify this: All the
18 documents that have been described, 1 through 5, are
19 hearsay. So they aren't in and of themselves
20 admissible because they are excluded as statements
21 offered for the truth, out of court statements, so
22 you are starting off with that idea.

23 Then the question would be, when are
24 depositions admissible and when are they required to
25 be disclosed? Well, the Court requires deposition

1 excerpts -- and it's excerpts because nobody wants
2 to have the whole deposition addressed in court --
3 those important parts. But those are normally
4 offered by question and answer. If they are offered
5 for substantive proof in your case in chief, an
6 attorney and another attorney might go back and
7 forth with relevant questions.

8 Otherwise, for impeachment, they will
9 never be admitted as a separate document. If you
10 ask a witness a question and you can thereafter
11 impeach them because of an inconsistent statement in
12 a deposition, then, once you have impeached them,
13 you don't go any further.

14 If they disagree with what's in the
15 deposition testimony, then there is a question as to
16 what substantive proof can come in. But I am not
17 aware of anything that would allow the paper
18 document to constitute that substantive proof.

19 So if you have deposition excerpts
20 identified as exhibits, then they can be admitted on
21 a question/answer basis, assuming they are relevant
22 to your case, but the paper documents are not
23 admissible at all.

24 So where does that leave you with regard
25 to these depositions?

1 MR. RADBIL: Using them for impeachment
2 purposes.

3 THE COURT: So you don't plan to use them
4 by question/answer, another attorney as substantive
5 proof?

6 MR. RADBIL: No, because defense counsel
7 has said that Mr. Wyatt is here, and he was the one
8 that was deposed as the corporate representative of
9 the defendant. So his testimony in the deposition
10 would be used solely for impeachment.

11 THE COURT: I guess I left out the part
12 that you still can't use it if they are available.
13 If you want to use them for impeachment, then they
14 can't be offered as regular exhibits. I think we
15 are all clear on that.

16 So on that particular portion of their
17 motion, the defendant's motion is granted,
18 essentially it seems to be almost by agreement, but
19 should be clear.

20 Okay. Ms. Malone, did you have some other
21 exhibits that you were objecting to?

22 MS. MALONE: Yes, ma'am.

23 THE COURT: Come on up.

24 MS. MALONE: Your Honor, we actually agree
25 to 6 and 7.

1 THE COURT: Okay.

2 MS. MALONE: So that gets us to
3 Exhibit Number 8.

4 THE COURT: One moment. Let's make sure
5 I'm clear -- what pages are 6 and 7 on?

6 MS. MALONE: I didn't put an objection in
7 it because we didn't object to it. We only listed
8 the ones we objected to. I'm sorry.

9 THE COURT: So you objected to Plaintiff's
10 1 through 5, and we have ruled on that. But what is
11 left? You said there were some you agreed to.
12 Where are they in the objections?

13 MS. MALONE: I see what you are saying.
14 The next one we have an objection to is Number 8.

15 THE COURT: Okay.

16 MS. MALONE: And that is on the bottom of
17 page 10, Your Honor.

18 THE COURT: Okay.

19 MS. MALONE: The problem with Number 8 is
20 that Mr. Radbil, during the course of discovery,
21 produced a CD to us that -- that has some recordings
22 from a voicemail system. And before each of these
23 grouped recordings, there is a person who I don't
24 know who it is, it's not Mr. White, a female giving
25 a description and offering her comment on the

1 recordings. And I think that's pure hearsay, Your
2 Honor.

3 The recordings, themselves, may be
4 admissible, probably are admissible, but not the
5 form that he's provided to us with Exhibit 8, which
6 includes these comments by some unknown person.

7 THE COURT: Okay. Mr. Radbil.

8 MR. RADBIL: I think those objections were
9 addressed in the motion -- in the order on
10 dispositive motions, and I think the objections were
11 overruled on the grounds that the documents were
12 ad- -- the recordings were adequately authenticated
13 by Dr. White's affidavit, which is on file and which
14 is also one of plaintiff's exhibits.

15 The authenticating declaration is
16 Exhibit 9. It is dated December 13, 2012. And I
17 think the remaining objections to plaintiff's
18 exhibits pertaining to similar exhibits, which in
19 the dispositive context the Court has already ruled
20 were authenticated.

21 THE COURT: I can tell you that I don't
22 recollect specifically passing upon this
23 introductory-type comment by some individual outside
24 of the case, so I would have to look at it.

25 I would be surprised if I would have

1 considered that and allowed it in, but it's not
2 admissible. The Court isn't bound, even if I did
3 rule it admissible at summary judgment, to also
4 allow these things in for trial. So how otherwise
5 would they be admissible if you are talking about,
6 say, prefatory comments before the recording
7 started?

8 MR. RADBIL: We can edit the prefatory
9 comments and have Dr. White authenticate the same
10 thing. I believe that the prefatory comments state
11 voicemail messages received such and such date. But
12 I would have to go back and look at exactly what
13 they say.

14 THE COURT: Okay.

15 MR. RADBIL: I don't think it's . . .

16 THE COURT: Let me reserve ruling on 22,
17 and let's move on to the next one. And then we will
18 go back to that, and that will be Exhibit 9, the
19 declaration.

20 MS. MALONE: Hearsay, Your Honor. That's
21 Mr. White's declaration that's being offered, and I
22 believe that's a violation of the hearsay rule.

23 THE COURT: Mr. Radbil.

24 MR. RADBIL: I think the Court has
25 overruled the same objection in the dispositive

1 context to this exact declaration on the grounds
2 that --

3 THE COURT: Okay. He can submit a
4 declaration in support of his motion for summary
5 judgment or response to a motion for summary
6 judgment, but an actual physical declaration at
7 trial is hearsay. It's an out-of-court statement.

8 Obviously, we don't have Mr. White come in
9 and talk to me during summary judgment. It's an
10 out-of-court statement. I'm not aware of any
11 exception. And when a person tries to offer their
12 own statement, it's, again, hearsay and typically
13 considered self-serving, so it's not admissible at
14 trial.

15 MR. RADBIL: The reason it was included is
16 to authenticate the recording, which of course he
17 can testify live does authenticate it that way.

18 THE COURT: I would sustain the objection
19 to Plaintiff's Exhibit Number 9 by the defendants.
20 The declaration, itself, is hearsay, and the Court
21 did not predict or in any way ensure that something
22 like this would be admissible at trial. It couldn't
23 be, and it isn't. So let's move on, then, to
24 Exhibit 10 that the defense is objecting to.

25 MR. RADBIL: May I clarify one point?

1 THE COURT: Yes.

2 MR. RADBIL: The ruling does not prohibit
3 Dr. White from testifying to matters also contained
4 in this declaration, it's just the declaration
5 itself.

6 THE COURT: I don't know what's in the
7 declaration, I don't recall. But I'm assuming if
8 it's not hearsay and it's firsthand knowledge then
9 he will have a full range of ability to testify.

10 MR. RADBIL: Thank you.

11 THE COURT: Okay.

12 MS. MALONE: Your Honor, Exhibit Number 10
13 is a Web page, an Internet Web page that the
14 plaintiff has produced that's dated October the 12th
15 of 2012, which is some year-and-a-half post any
16 relevant time period here.

17 It was not produced to us in discovery,
18 and we asked specific questions asking them for
19 requests for production, asking them to give us
20 documents that would support their allegations
21 related to this.

22 We saw it for the first time. I think he
23 did attach it to the summary judgment. I don't
24 think that changes our position on it. It is a
25 year-and-a-half past the time period, and it's not

1 relevant, and I think it is hearsay in this setting.

2 THE COURT: Okay. Rather than have you
3 all up and down up and down, if you just speak up,
4 as long as Ms. Archuleta can hear you, I will let
5 you do it from the tables. If she can't hear you,
6 you will have to go back to the lectern.

7 Mr. Radbil, if you will pull the
8 microphone over and give me your response to that.

9 MR. RADBIL: Our response, Your Honor, is
10 that Exhibit 10 is a page from original Regional
11 Adjustment Bureau's own website. And it was
12 submitted to the Court and served on defense counsel
13 on September 10th, 2012, and it is their own
14 document. It's their own marketing materials on the
15 website.

16 The Court ruled again in the
17 dispositive -- in the order on dispositive motions
18 that this was a self-authenticating document. And
19 it's frankly a key document that admits that the
20 defendant uses a, quote, predictive dialer to
21 contact thousands -- to dial thousands of numbers
22 each day. And it dovetails with a previous letter,
23 which was also objected to, and that objection was
24 also overruled by this Court from the defendant to
25 the Federal Communications Commission in 2006, which

1 was in support of the American Collectors
2 Association petitioning the FCC to exempt debt
3 collection calls from the telephone consumer
4 protection act; in other words, rule that if you are
5 collecting a debt, the TCPA does not apply.

6 So this document, although it's dated --
7 the website -- this shows the website was after,
8 dovetails with the admissions and the statements
9 against self-interest in the letter to the FCC in --
10 in April 2006.

11 Some of these documents are official
12 documents which bear seals of United States Offices.
13 And this document is, again, their own advertising.
14 And I deposed Mr. Wyatt and confirmed through
15 deposition testimony the correct address of his
16 website, which matches this. And we detailed all of
17 these things in the response to the objections to
18 our motion for summary judgment evidence, and the
19 Court ruled that there's plenty of indications of
20 authenticity. And again, it's -- there's no dispute
21 that they are authentic --

22 THE COURT: Okay. I've heard enough from
23 you. I want to go ahead and reserve ruling on that
24 one, as well. And it looks like this Exhibit 11 is
25 what you've just referred to as a letter to the FCC

1 authored by a vice president of the Regional
2 Adjustment Bureau. Is that what you were just
3 referring to?

4 MR. RADBIL: Yes, Your Honor.

5 THE COURT: Okay. And how were you
6 planning on authenticating that?

7 MR. RADBIL: I believe that it's a
8 self-authenticating document. It's stamped by the
9 FCC. It also bears the signature of Robert Pugh.
10 And in the -- and the letterhead of RAB,
11 Incorporated.

12 So I believe that it's self-authenticating
13 and, again, in our motion for summary judgment
14 briefing --

15 THE COURT: The summary judgment
16 rulings -- unless you can show me some authority to
17 the contrary, and I have been doing this a long
18 time -- in no way clears the path for you to get
19 summary judgment exhibits in evidence.

20 Mr. Radbil, you should know that as a
21 practicing attorney. So what we're talking about
22 here is a letter that you tell me is
23 self-authenticating, but you're going to have to
24 provide me some authority that establishes that,
25 because basically it is a hearsay document.

1 MR. RADBIL: Well, it's a statement
2 against their interest in this case because they are
3 advocating for a position which is directly contrary
4 to their --

5 THE COURT: The question would be, how do
6 you plan to authenticate that?

7 MR. RADBIL: I don't know what the best
8 and most efficient way to do it is. I know it can
9 be done and can we just reserve objections at the
10 time of --

11 THE COURT: No, we will figure this out
12 this afternoon. It is hearsay, and we have to
13 figure out a way you can offer it as an exception to
14 the hearsay rule.

15 MR. RADBIL: It's a public record. Excuse
16 me.

17 THE COURT: I don't know if it's an
18 admission. I don't know if 23 it's a declaration
19 against interest, I don't know, but it's hearsay.
20 So we will talk about that more in a few minutes.

21 Let's go to the last couple of exhibits.
22 Ms. Malone, that would be Plaintiff's Exhibit 12 and
23 Plaintiff's Exhibit 16. Let's take those up if we
24 could.

25 MS. MALONE: Your Honor, Plaintiff's

1 Exhibit 12 is very similar to the FCC ruling. It is
2 a Texas document, and I don't think he has properly
3 authenticated it under the hearsay rule. There are
4 exceptions, but you have to do a seal and a
5 certification for a state agency, and that has not
6 been done in this case. It is also irrelevant, Your
7 Honor. It is at a different time period than what
8 was the relevant time period in question. But my
9 biggest problem is failure to authenticate a hearsay
10 document.

11 THE COURT: Mr. Radbil, what exactly does
12 this document do? What is the content?

13 MR. RADBIL: It's a public record from the
14 Public Utilities Commission of Texas. It's called
15 an ADAD report. Texas has a statute that regulates
16 the using of automatic dial announcing devices,
17 which is defined very similarly to the definition of
18 an automatic telephone dialing system under the
19 federal statute at issue.

20 THE COURT: What does this letter say?

21 MR. RADBIL: This letter shows that Robert
22 Wyatt applied for a permit and was granted a permit
23 from -- it's not a letter, it's actually a report
24 of -- it's a record of them having a permit to
25 operate this dialer that constitutes an ADAD.

1 And the courts have held and we cited
2 authority in our dispositive briefing, and in the
3 Court's order the Court noted that this evidence
4 does create a question of fact as to whether or not
5 the device they used qualifies under the TCPA
6 definition. Because if you are using something that
7 you need to be permitted under a very similar or
8 identical definition, which we have, and it's an
9 admission, it's a public record, it's a statement
10 against their interest.

11 THE COURT: What does it admit?

12 MR. RADBIL: That they -- that Robert F.
13 Wyatt, the corporate representative, applied for and
14 was granted a permit to operate an ADAD in the State
15 of Texas. It also lists their website as RAB,
16 Incorporated.

17 THE COURT: Hang on. Hang on. How is it
18 relevant. What is it probative to?

19 MR. RADBIL: The question of whether the
20 device they used to call the plaintiff constitutes
21 an automatic telephone dialing system under the
22 TCPA.

23 THE COURT: How does that document bear
24 upon that question?

25 MR. RADBIL: Because this document shows

1 that they were granted a permit to operate in ADAD,
2 which is defined under Texas law in a very similar
3 manner to the federal definition of automatic
4 telephone dialing systems. The courts have held
5 that -- it's almost a state law analog of the TCPA.
6 It regulates slightly different conduct, but the
7 same technology.

8 THE COURT: So it doesn't bear upon the
9 actual technology that you are complaining about in
10 this case?

11 MR. RADBIL: Yes, I believe that it does.

12 THE COURT: I thought you said it was a
13 different --

14 MR. RADBIL: No. The Texas statute
15 regulates different conduct.

16 THE COURT: So what this shows is they had
17 a permit to do what you are complaining about?

18 MR. RADBIL: No. It shows they had a
19 permit to operate technology that satisfies the
20 definition under the federal act, and that's one of
21 the questions at issue.

22 THE COURT: Okay. But I still don't know
23 how it proves anything in your case.

24 MR. RADBIL: It proves that the piece of
25 technology they are using was required to be

1 permitted under Texas law under a very similar
2 definition as the definition of the automatic
3 telephone dialing system under the TCPA.

4 So if you are operating a device in one
5 state, in Texas, and you need a permit to do so, if
6 it satisfies the definition, then you get the
7 permit. He got the permit. And the -- permit, the
8 definition that requires you to apply for and obtain
9 the permit is nearly identical to the definition.

10 THE COURT: Nearly identical.

11 MR. RADBIL: Um-hum.

12 THE COURT: But it's not identical.

13 MR. RADBIL: It's not identical.

14 THE COURT: Let me hear from Ms. Malone
15 again, and we will take a break in a few minutes and
16 get back out.

17 Ms. Malone.

18 MS. MALONE: Your Honor, I disagree with
19 him, because that would require an attorney to stand
20 up and give a legal interpretation of the statute.
21 But I'm just doing basic Rules of Evidence here.
22 And if you look under the Federal Rules of 803 for a
23 hearsay objection, the exception for public record,
24 these two documents, neither one, meet the
25 definition. There's no authenticity, and it doesn't

1 set out anything that would be admissible as a
2 hearsay exception. So even before we get into what
3 it proves, he still has an obligation to lay the
4 predicate to offer a document. And he hasn't done
5 that for these two.

6 THE COURT: When you say, these two, we
7 are talking about Plaintiff's Exhibits 11 and 12.

8 MS. MALONE: Yes, ma'am.

9 THE COURT: Let's talk about 16 and 17,
10 and then we will take a break.

11 Ms. Malone.

12 MS. MALONE: 17, Your Honor, we solved the
13 problem. He gave a different document number in his
14 description, but he gave me today his exhibit, and
15 so no problem.

16 THE COURT: Okay. So the exhibit --

17 MS. MALONE: So that one is fixed.

18 THE COURT: 17 is what actually --

19 MS. MALONE: It actually turned out to be
20 a letter. The reference he gave to us was not the
21 same thing, so. . .

22 THE COURT: And the correct reference
23 would be . . .

24 MS. MALONE: Well --

25 THE COURT: That's all right. That's all

1 right. It's another agreement you agree to.

2 MS. MALONE: Yes, ma'am.

3 THE COURT: 16.

4 MS. MALONE: 16, we did object to the
5 telephone, Mr. White's cell phone bill. And I think
6 I could probably continue to object to it as being a
7 hearsay document. But as a matter of ease, my
8 biggest problem with it is, because we put it as a
9 potential exhibit, is because it has these dark
10 lines that appear every three or four sections, and
11 I can't read it.

12 And Mr. Radbil said he would try to get
13 the original scanned in and see if he could get me a
14 better copy. If he could get me a better copy,
15 Judge, I will agree to that document.

16 THE COURT: Mr. Radbil.

17 MR. RADBIL: I think the copy is
18 sufficiently legible. I agree it's not perfect.

19 THE COURT: Did you tell her you would try
20 to get her a better copy? Will you be able to do
21 that?

22 MR. RADBIL: I don't know if I can get a
23 copy that will satisfy her standards, but I will do
24 my best to get the best copy that we can.

25 THE COURT: When will you be able to do

1 that?

2 MR. RADBIL: This evening.

3 THE COURT: Let's take about a ten-minute
4 break.

5 (Recess taken from 3:28 to 3:59.)

6 THE COURT: Sorry to keep you waiting.
7 All right. Let's go back to the -- you can take a
8 seat, Mr. Radbil, until I need you. Unless you're
9 standing up to tell me you all have settled the
10 case. That's not why you were standing up?

11 MR. RADBIL: No, Your Honor.

12 THE COURT: Okay. Let's go back to where
13 we left off, and that was document 76.

14 Let me back up. With regard to granting
15 the Emergency Motion to Quash, document 99 in the
16 docket, I grant document 100 because I believe, as
17 you mentioned, it was refiled. Okay.

18 Did you have anything else, Ms. Malone, on
19 the exhibits, if you want to reiterate anything
20 before I go ahead and ask Mr. Radbil a few more
21 questions and we resolve this?

22 MS. MALONE: Sure, Your Honor. We were
23 talking about 803. I just flipped through to the
24 Federal Rule 902, which is the self-authenticating
25 rule, and these documents simply do not meet any of

1 the criteria set forth. I think that you and I are
2 on the same page, but I wanted to make sure that you
3 understood what I was talking about, the 803
4 exception, I was incorporating the lack of indicia
5 that's required under 902.

6 THE COURT: All right. Let's go back for
7 a minute, and let's talk about the website.
8 Clearly, if there's any question about it,
9 Mr. Radbil, there should be none, and that is that
10 the Court -- the Court's rulings on summary judgment
11 evidence are in no way binding on the Court as far
12 as trial exhibits.

13 Rule 56 pretty much sets that out, but
14 there are myriad cases on this. So I just want to
15 be sure that, as you say that, you may bring that up
16 as a factor for the Court to consider, but the
17 Court's ruling on summary judgment in no way
18 predicts what is admissible at trial; many different
19 considerations for trial evidence.

20 So when we are talking about the website,
21 then, the website is something that was brought up
22 on summary judgment. Looking at it from this
23 context, who was going to be the one to testify
24 about this website? Who was the sponsoring witness?

25 MR. RADBIL: Robert F. Wyatt, the

1 corporate representative.

2 THE COURT: You were going to call him?

3 MR. RADBIL: Yes.

4 THE COURT: Okay. As a witness in your
5 case?

6 MR. RADBIL: Yes.

7 THE COURT: And I'm assuming he is going
8 to be here?

9 MS. MALONE: Yes, ma'am.

10 THE COURT: I'm going to overrule the
11 objection to the website. This is something that's
12 been here in the case. This is -- again, we're not
13 talking about something that's five or ten years
14 removed, it's basically how the corporation is
15 projecting itself out there in the general public.

16 I think as far as authentication, what we
17 are talking about is reliability. And I think that
18 if a person can testify, either the plaintiff
19 himself or this defendant witness that the plaintiff
20 is planning to call, sufficiently circumstantially
21 to establish that this is exactly how the
22 corporation has been presenting itself, at least in
23 part in regard to the issues underlying this case,
24 that it's admissible as an admission.

25 So I am not going to rule that out. You

1 will have to late predicate, Mr. Radbil. Okay?

2 MR. RADBIL: Yes, Your Honor.

3 THE COURT: Okay. All right. Talking,
4 then, about Exhibit 11, which is this letter. It
5 seems to me that, if anything, this would be
6 admissible for impeachment. I don't see how it
7 comes in in your case in chief, Mr. Radbil. Maybe
8 you can offer a few more comments on this, but . . .

9 MR. RADBIL: In terms of relevance or in
10 terms of authenticity?

11 THE COURT: Both.

12 MR. RADBIL: I think it can be
13 authenticated by the corporate representative
14 because it was a letter that was sent in the normal
15 course and scope of their business containing
16 admissions so that the corporate representative
17 would have knowledge of this correspondence and be
18 able to authenticate it. Because it was, again,
19 sent in the form in a capacity by Robert Pugh, the
20 vice president.

21 And in terms of relevance, the point of
22 the letter is to prompt the FCC to rule that debt
23 collection calls are excluded and for the reason
24 that they use -- excluded from the TCPA for the
25 reason that it would hurt their profits, et cetera.

1 It shows that they have an interest in using --
2 well, first, it admits that they use predictive
3 dialers, as does their website.

4 If I may raise a side point, Your Honor.

5 THE COURT: No, don't raise a side point.
6 Here's what we are going to do with this. Assuming
7 you can authenticate this letter by your corporate
8 representative from the defense that this is, in
9 fact, something that came from them sufficiently
10 circumstantially and assuming the witness is
11 testifying truthfully, as he is required to do so,
12 then I will admit it.

13 I guess what I'm saying here is, it's not
14 admitted, it's just that the objection to preclude
15 it from even being considered or used is overruled.
16 And that would be, then, defendant's objections as
17 to Exhibit 10 are overruled and as to Exhibit 11 are
18 overruled.

19 Now, so far as 12, let me hear your
20 argument on this one again.

21 MR. RADBIL: So the ADAD report is a
22 public record of a permit that Robert F. Wyatt
23 personally applied for, and he testified about it, I
24 believe. So this could be authenticated through
25 him.

1 And the ADAD report is relevant to show
2 that the technology qualifies under the
3 definition -- under the federal definition, because
4 the state act contains the similar definition. And
5 the overlapping portions of the definition, stored
6 and dialed numbers, I think is enough. I think that
7 they have actually admitted in the pretrial order
8 that an automatic telephone dialing system had been
9 used in this case.

10 THE COURT: The pretrial order hasn't been
11 signed or relied upon yet. So let's say this: With
12 regard to this document, as I understand it, this is
13 to show this auto dialing system is part of what you
14 are saying they violated in this case, correct?

15 MR. RADBIL: Yes.

16 THE COURT: And this shows that they were
17 at least aware of the laws surrounding the use of
18 the auto dialer system, because it wasn't a letter
19 telling them they couldn't use it or that they -- it
20 just addresses that they had some knowledge of this
21 system.

22 MR. RADBIL: It shows that they knew their
23 technology qualified under the state definition and
24 that they needed to be permitted.

25 THE COURT: Okay. I gotcha.

1 MS. MALONE: Your Honor, two things:
2 First, this is not a document created by RAB or
3 Mr. Wyatt or anything else. This is a document that
4 simply says that they had have an ADAD policy.

5 There is a big dispute in the industry
6 about whether or not the ADAD statute even meets the
7 definition of the TCPA. I know that in the summary
8 judgment we both cited different standards on that,
9 but the definition of the ADAD is not the same as
10 the TCPA.

11 So unfortunately, you can have a dialer
12 that does not meet the definition of an auto dialer
13 under the TCPA. And for him to say that we have
14 taken something that my client did out of caution,
15 which is what Mr. Wyatt testified to, he said, I
16 decided it was just safer to get it than not, even
17 though I didn't think we meet this definition, so he
18 wouldn't get in trouble with the State of Texas and
19 then somehow convert that into, well, that means you
20 meet the definition of the federal statute.

21 THE COURT: On Plaintiff's Exhibit 12, I'm
22 not going to say that it's forever ruled out, but
23 I'm going to say this: That it cannot be discussed,
24 addressed, or even mentioned without approaching the
25 bench, because I think that defense counsel makes a

1 good point on this. And I'm not sure if it's not
2 more confusing than it is probative, and I'm not
3 100 percent sure that there's much probative value
4 to it at all. So that's that on that one. Just
5 remember you cannot mention it without approaching
6 the bench. We are off that topic.

7 Let's move on to the next one, and that's
8 Exhibit 16. Have you resolved it as far as the
9 banner or the label to --

10 MS. MALONE: He said he was trying to get
11 it -- I don't think he's had a chance to do that
12 yet.

13 THE COURT: Other than that point, is
14 there another objection that you had to it?

15 MS. MALONE: I had one, but I will
16 withdraw it.

17 THE COURT: Again, none of these are
18 automatically admissible. They all have to be
19 authenticated. But I'm going to overrule
20 plaintiff's exhibit objection as -- defense
21 objection to Plaintiff's Exhibit 16 is overruled.

22 It's not automatically admitted. It still
23 has to have a predicate for its authenticity and
24 admissibility, but you can attempt to do that.

25 Does that take care of document 76, the

1 defense objections, then? And I think they were
2 both to witnesses and exhibits.

3 MS. MALONE: Yes, ma'am, that also takes
4 care of 105 and 106 --

5 THE COURT: Great.

6 MS. MALONE: -- which were just
7 regurgitations.

8 THE COURT: We have to go back to the
9 issue of the recordings. And I was looking back at
10 that in the summary judgment order and the -- the --
11 again, we start off with this idea that the fact
12 that the Court considered part of these recordings
13 in finding a genuine fact issue do not in any way
14 render them admissible or even a presumption that
15 they are admissible at trial.

16 I think that the -- to the extent they are
17 prefatory comments, that those comments are going to
18 have to be taken off or out of the recording, I
19 would agree with defense counsel on that. So far as
20 them being inadmissible hearsay, is that part of the
21 objection as, well?

22 MS. MALONE: Yes, ma'am.

23 THE COURT: Here's my position on that.
24 The rule from 801(d) that permits admissions by a
25 party opponent would technically cover recordings

1 and that type of thing that were sponsored by a
2 defendant corporation or phone calls.

3 There has to be some indication that these
4 type of phone calls can be imputed, at least, to
5 have been undertaken by agents of the corporation.
6 And then I think they would probably be admissible
7 at least as admissions.

8 And so I guess the question is -- and
9 Ms. Malone, I don't think he's got to -- he's
10 limited to phone calls by officers and controlling
11 parties. I think if they're calling on debt
12 collection on behalf of a debt collection defendant,
13 that as long as that can be circumstantially at
14 least qualified and quantified, that it's not ruled
15 out as an admission.

16 MS. MALONE: That's not my problem. That
17 is a good objection. I probably should make it at
18 trial, but let me focus the Court's attention on the
19 part that I really have a problem with.

20 The latter part of the recording, there
21 are some electronic messages that I think are a
22 voicemail envelope for Mr. White's system. My
23 client does not leave electronic messages. So I
24 don't think that could be an admission against us
25 when Mr. Wyatt, my client -- their names are very

1 similar, Judge, and I think that's going to be
2 confusing to us.

3 Mr. Wyatt testified that they never leave
4 electronic messages. Dr. White had a voicemail that
5 he could access from his work. That envelope says,
6 press 1, press 3, press 7. And Mr. Radbil is
7 arguing that is a message we left, and we're saying,
8 no, we didn't. We don't leave messages like that.
9 So I don't know if you want to separate those out so
10 that we can address them in a different way.

11 THE COURT: Let's make sure Mr. Radbil
12 intends to present those.

13 Mr. Radbil.

14 MR. RADBIL: Yeah, because liability has
15 been decided under the D6 and the 11 claims under
16 the FDCPA which relate to leaving messages or
17 communications without identifying a meaningful
18 disclosure of caller's identity or stating that the
19 caller --

20 THE COURT: She's saying they didn't do
21 it, it's not them.

22 MR. RADBIL: Right. So one of the fact
23 questions identified in the summary judgment order
24 was whether or not this prerecorded message came
25 from some transition or came from the defendant.

1 Our argument is it clearly came from the defendant,
2 so. . .

3 THE COURT: I think it's a fact question.
4 It's an interesting fact question. And perhaps over
5 the next five or ten years these kinds of things
6 will be resolved in these cases because they are
7 relatively new, but I think it's a fact question.
8 So I'm going to overrule the objection to that -- of
9 the defense as to that, and I believe that is
10 Plaintiff's Exhibit 8.

11 Again, these are not automatically
12 admissible, Mr. Radbil.

13 MR. RADBIL: I understand, Your Honor.

14 THE COURT: All right. Does that take
15 care, of then, I think it does, document 76 and as
16 you mentioned 105.

17 MS. MALONE: Yes, ma'am, and 106.

18 THE COURT: And 106. Okay. All right.
19 The next thing I have is, I believe it's going to be
20 documents 80 and 83. Let me locate those. That's
21 motions in limine. Both sides have submitted
22 motions in limine.

23 Plaintiff's motion in limine is document
24 83. Defendants have responded to that in Doc 91.
25 And then the defendants have a motion in limine in

1 80. So let's take up the plaintiff's first, and I'm
2 assuming that if some of these are boilerplate then
3 we won't have objections to them.

4 Mr. Radbil.

5 MR. RADBIL: Thank you. Number 1 is
6 fairly boilerplate. I think we all agree that no
7 experts have been designated. So I think that to
8 the extent that testimony borders on expert, it's
9 proper to make an objection to that testimony at
10 trial.

11 THE COURT: Ms. Malone.

12 MS. MALONE: Your Honor, the problem is
13 that I tried to clarify this with Mr. Radbil. My
14 client is in an industry that talks about computer
15 systems and account notes and dialers and what have
16 you. I don't think that's expert testimony, but I
17 could not get a clarification from Mr. Radbil if he
18 was going to be objecting to that as expert
19 testimony when they are simply explaining how their
20 business works.

21 THE COURT: Mr. Radbil.

22 MR. RADBIL: If he is testifying about
23 what the dialer does and how it operates based on
24 his day-to-day employment and use of it, that is, I
25 think, okay. If he goes further and tries to

1 qualify it affirmatively or negatively --

2 THE COURT: Give me an example.

3 MR. RADBIL: It does not meet the
4 statutory definition because of A, B, C, D. That
5 would be something that would be expert testimony,
6 and he would need to be designated.

7 If he says, we put the numbers in and it
8 spins around and it dials 1,000 numbers and connects
9 the call to whoever and then re-routes this
10 somewhere else, I know this because I teach people
11 how to use the dialer, that's how it works. I think
12 he can testify about that. But when it comes to
13 having him draw a conclusion on the ultimate issue
14 of whether it satisfies the statutory definition,
15 based on things that are beyond the lay person's
16 knowledge or ability to understand, I think that
17 crosses the line.

18 THE COURT: Ms. Malone.

19 MS. MALONE: The problem, Judge, is it is
20 Mr. Radbil's obligation to show that that dialer
21 meets the definition. He's going to be asking
22 Mr. Wyatt those very questions because he has to
23 prove the dialer meets it. Once he does that, I
24 think he opens the door for him to say anything if
25 he were going to. It's his duty to show the dialer

1 meets the TCPA definition.

2 THE COURT: So far as I have heard right
3 now, if that's the problem you are having,
4 Mr. Radbil, I overrule the objection. I think in
5 good faith both sides have addressed this issue of
6 expert witnesses or lack thereof. But I agree, from
7 what I have heard so far, it goes to the very core
8 of what your client is accusing them of doing. And
9 right now I overrule the objection. Let's move on
10 to the next one.

11 MR. RADBIL: So can I clarify the
12 overruling?

13 THE COURT: Mr. Radbil, I have no
14 prediction on exactly what the testimony is going to
15 be.

16 MR. RADBIL: Okay.

17 THE COURT: So if you're asking me to
18 predict what exactly specifically is going to be
19 allowed and what is not, I can't do that. This is
20 what -- I think he -- the people that you have
21 accused in this case and taken through this case
22 since 2011 have a right to defend themselves on the
23 accusations you are accusing them of.

24 I don't know exactly what that will
25 involve, but I would certainly guess that it's

1 beyond the scope of a man on the street of this
2 telerecording equipment. I don't know how far that
3 goes, so I don't know how to clarify it further. I
4 think we have covered this topic, and I want to move
5 on to the next one. And that is excluding attempts,
6 as the plaintiff has described them, by defense to
7 force plaintiff into a self-diagnosis.

8 What exactly are you talking about?

9 MR. RADBIL: So we had an issue or an
10 episode during the deposition Dr. White where the
11 questions, in our point of view, attempted to elicit
12 a differential self-diagnosis, which Dr. White
13 cannot ethically make of himself.

14 So the DSM was involved, and questions
15 were asked such as: So you are not saying you fall
16 into the category of this, this, or this. And of
17 course, because he can't ethically diagnosis
18 himself, we don't want that same type of thing to
19 happen at trial.

20 THE COURT: He's going to talk a lot about
21 how he suffered emotionally from this; is that
22 correct?

23 MR. RADBIL: He will.

24 THE COURT: And what you're trying to
25 avoid is them pigeonholing him into some sort of

1 categorizing him under the DSM?

2 MR. RADBIL: Or using a differential
3 attempt to say it couldn't be that bad because it
4 doesn't rise to the level of DSM, because he cannot
5 say whether it does or does not because it's
6 unethical for him to do so.

7 MS. MALONE: Judge, that's not exactly
8 what happened in the deposition. Mr. Radbil
9 elicited testimony from his client that he met
10 certain particular definitions, including a panic
11 attack.

12 What I did was said: You're not allowed
13 to give a diagnosis, isn't that right, Doctor? In
14 fact, I was doing the exact opposite of what he's
15 saying. I was saying, you can't give a diagnosis.

16 I anticipate, Judge, if he gets on the
17 stand and starts testifying about those issues,
18 that, in the DSM there is a specific section that
19 talks about stressors that you would consider that
20 would cause people's mental anguish, I think that
21 should be fair game to ask him, are these other
22 things that could be a cause of your mental anguish?
23 He has a long-term illness, that certainly is one
24 that is a life-stressor.

25 I think it's fair game for me to talk to

1 him about the fact that -- about the fact that he
2 has what we might not consider lifetime stressors
3 under the DSM, if you move, you get married, you
4 have a child, those are all good things, but those
5 are also stressors that cause people to have mental
6 anguish.

7 THE COURT: Why are we incorporating the
8 DSM into this at all?

9 MS. MALONE: He was having his client
10 specify about mental anguish and panic attacks which
11 fall under the DSM, and his client is a licensed
12 professional counselor. And the problem I have,
13 Judge, he is going to get him on the stand and have
14 him testify he has a Ph.D in psychology and is a
15 licensed professional counselor, and when he says
16 mental anguish, that's different than an accountant
17 saying this.

18 THE COURT: Mr. Radbil, anything else?

19 MR. RADBIL: Yes. This is a very serious
20 issue, because I thought what happened at the
21 deposition was very bad. It put my client in a very
22 compromising position. He can testify about the
23 facts of his mental anguish, but I don't want him to
24 be put in a position where he is forced to choose
25 between making an unethical self-diagnosis,

1 differential or otherwise, and conceding implicitly
2 that it may not be that bad. Because in this case,
3 my client has suffered actual damages, and that's
4 why I think you know we had trouble settling the
5 case because they are legitimate, but he has to
6 testify about them, but he cannot diagnose himself.

7 THE COURT: Sounds to me like he is enough
8 of an expert and an educated man in this particular
9 area that he can't be surprised or hoodwinked into
10 giving an answer that's negative towards him because
11 he can just answer that he doesn't know the answer.
12 He's not qualified to answer that in the particular
13 context of the way the question is being asked. So
14 I don't see the problem.

15 I mean, if you're talking about -- what
16 normally happens in this area, objecting to
17 cross-examining on pain and suffering, is of
18 specific instances, inflammatory-type instances,
19 like domestic abuse or something like that are
20 brought up. And that's the kind of thing that I
21 would say you approach the bench. But if you are
22 talking about trying not to corner him in an area
23 that he's already somewhat knowledgeable about, I
24 don't see -- I would overrule that objection.

25 MR. RADBIL: Don't you need an expert to

1 testify about the DSM in the first instance?

2 THE COURT: Mr. Radbil, it depends on what
3 your client, the accuser here, says about them.
4 He's brought everybody here, and he can't use his
5 condition as a sword and a shield. He's, as far as
6 I can determine from what I have heard, absolutely
7 these areas are fair game because you're asking them
8 to pay for his pain and suffering. So I don't see
9 the problem. I overrule the objection, and I
10 overrule -- I will not grant that motion in limine,
11 that particular one which is number 3, I believe.
12 Yes.

13 MS. MALONE: Two.

14 THE COURT: Number 2, sorry. We're just
15 moving to 3.

16 MR. RADBIL: So then they would be
17 permitted to attempt to do something unethical?

18 THE COURT: Mr. Radbil, I really don't
19 understand where you're coming from in much of your
20 strategy here. I have no idea why you're asking or
21 making that kind of a statement. It's ridiculous,
22 as far as I can see, as are some of the other things
23 that you have said this afternoon.

24 But the answer is, your client brought
25 everybody here. He is going to be subject to

1 cross-examination about his pain and suffering
2 because he's specifically trying to get money
3 damages from the defendants for that very reason.
4 That's it.

5 If you are talking about specific
6 instances -- that's not what you have raised, but if
7 we are, that's a different matter. We're talking
8 about him trying to explain his mental condition as
9 best he can, I deny the motion in limine.

10 Let's move on to the next one. That's 3.

11 Could you explain this one, please?

12 MR. RADBIL: This is fairly boilerplate.
13 It deals with general conclusory statements about
14 how things generally are.

15 THE COURT: I would overrule that, because
16 it's more appropriately the topic of a specific
17 objection.

18 MR. RADBIL: I agree.

19 THE COURT: I don't think I could make a
20 specific ruling on that. Overruled.

21 And the same with number 4. Personal
22 knowledge is obviously required under the Federal
23 Rules of Evidence. There are certain exceptions to
24 that, but I'm not going to make a blanket ruling.
25 That really is more appropriate for a specific

1 objection. So 4 is overruled.

2 Anybody can file a lawsuit. That
3 obviously would be inappropriate argument, and
4 that's number 5 so I would grant that.

5 The date or circumstances under which the
6 plaintiff employed his attorneys, I don't know why
7 that would be relevant. Ms. Malone?

8 MS. MALONE: The problem with that, Your
9 Honor, is twofold: One is, in his petition, he
10 alleged that we contacted his client when they were
11 retained by counsel. It's not how he employed them,
12 it's the date that matters to me.

13 The second thing is that we know that he
14 was having communication with his attorney by their
15 cell phone records instead of solving his problem,
16 which I think goes sort of to the mitigation issue
17 on resolving this debt which would have solved some
18 of his concerns, and that's really what it is. It's
19 the date not so much the manner.

20 THE COURT: I will grant that motion.
21 Approach the bench if you think it's an appropriate
22 item for discussion. And I will also grant number 7
23 for basically the same reasons. Approach the bench
24 if there is something with regard to the underlying
25 lawsuit and the attorney's conduct that is somehow

1 appropriate, and it's not appropriate without
2 approaching the bench.

3 MS. MALONE: If I could, just so you know,
4 these were related to if he was going to offer
5 expert testimony on attorney's fees. That was what
6 I was concerned in our response about. We are not
7 going to bring it up otherwise.

8 THE COURT: Okay. Thank you. Contingency
9 fee basis. I think I would grant that as well. And
10 I think that takes care of most of that until we get
11 to page 8, is that right, Mr. Radbil?

12 MR. RADBIL: Yes, Your Honor, I believe
13 so.

14 THE COURT: Okay. Number 9. I'm not
15 going to permit questions by the individual counsel
16 or voir dire by the individual counsel during the
17 jury selection. I'm going to go ahead and handle
18 the jury selection myself, ask questions that you
19 have submitted to me, maybe not all of them, but
20 some of them. So I don't know where that would --
21 that particular point would arise. So I will
22 certainly question them about it if they have issues
23 with regard to damages. But otherwise, I would
24 overrule it because it's not going to be pertinent
25 to the jury selection in this case.

1 Okay. Number 10 seems a bit general. Is
2 there anything else on that one, Mr. Radbil?

3 MR. RADBIL: No, so long as 8 was granted,
4 10 is taken care of.

5 THE COURT: I don't really understand what
6 you are asking for here in number 10. I don't plan
7 to submit special issues. I plan to submit
8 questions that ask the jury if you have proven your
9 case by a preponderance of the evidence. Okay? All
10 right.

11 MR. RADBIL: All right.

12 THE COURT: So that would be overruled;
13 granted in part and denied in part, that would be
14 document 83. I would now like to hear from the
15 defense on their motion in limine and, again,
16 hopefully we can get through some of this because we
17 have already discussed it or it's been -- it's
18 boilerplate.

19 MS. MALONE: Judge, actually, it's not
20 boilerplate, but we have actually covered it through
21 the rulings that you have made on the exhibits and
22 witness list. The only thing in our motion in
23 limine had to do with the admissibility of witnesses
24 or exhibits, so I think you've already covered
25 everything.

1 THE COURT: Okay. Let me look through it
2 real quick. Obviously both sides understand not to
3 bring up anything with regard to attorney's fees.
4 If the plaintiff prevails in this case, then
5 attorney's fees are allowed. The Court will
6 determine attorney's fees, not the jury.

7 Mr. Radbil, do you have any questions
8 about the defense motion in limine based upon what
9 Ms. Malone has said, that she believes the Court has
10 resolved it?

11 MR. RADBIL: Only to the extent that the
12 defense is claiming that we have waived any right to
13 seek attorney's fees under the Texas Act where
14 liability has also been determined, but because we
15 elect for Your Honor to decide after trial . . .

16 THE COURT: Again, I think the Court will
17 decide attorney's fees regardless, so I don't know
18 that that -- Ms. Malone.

19 MS. MALONE: Well, Your Honor,
20 unfortunately the Texas statute is, under Texas
21 common state law, does require the plaintiff to
22 prove up attorney's fees and get a jury finding.

23 I've had federal judges go both ways on
24 it, in all candor to you. But the truth of the
25 matter is, if he doesn't prove actual damages under

1 the Texas statute, he never gets there anyway
2 because there is no statutory award.

3 THE COURT: Mr. Radbil, you've indicated
4 that you've elected for the Court to determine
5 attorney's fees in any event?

6 MR. RADBIL: Yes.

7 THE COURT: Okay. All right. So I don't
8 think that's an issue.

9 Okay. I think that's 83. 80 -- let's
10 see. I still have document, 99 and 100, let me make
11 sure --

12 MS. MALONE: That's the motion to quash,
13 Judge.

14 THE COURT: Yes. Okay. Thank you. I
15 knew 100 sounded familiar. 99 is also the emergency
16 motion to quash. Okay. All right.

17 What I normally do is have the lawyers
18 agree to preadmit certain exhibits. Have you all
19 had any discussion about preadmission of exhibits?

20 MS. MALONE: I tried before, but I think
21 some of them are the same for us, so I think we
22 probably could do that pretty quickly.

23 THE COURT: If you all will address that
24 before we start up tomorrow and before we actually
25 begin the testimony before the jury, if we could

1 have -- what I do as a practice is have plaintiff's
2 counsel indicate what, if any, of defense numbered
3 exhibits they agree to preadmit, and I have defense
4 agree on the record as to those of plaintiff's they
5 can agree to preadmit. No one is forcing you to
6 agree to preadmit. I normally have agreement to 70
7 to 80 to 90 percent, but it's your choice on that,
8 and it does help move things along. So that's what
9 we will talk about when you get here tomorrow.

10 I'm not going to actually start the jury
11 selection until 10. I would like you to be here by
12 9:30 so we can talk about any additional issues that
13 might come up. As I mentioned, I plan to do the
14 voir dire. I believe I have questions from both of
15 you.

16 MR. RADBIL: We did not submit questions,
17 Your Honor.

18 THE COURT: If you want to bring some
19 tomorrow for the Court to address, I can't promise
20 you I will ask all of them. Here's what we do: I
21 will give a general jury selection. I will ask your
22 questions. I will go over general issues with the
23 jury. If anyone has a problem with anything -- and
24 I'm sure we will have people who have issues, we
25 will talk about debt collection practices and that

1 kind of thing, generally -- we will make note of
2 those people that may have to talk to us.

3 In this day and age, there are a lot of
4 people who have issues with that, and we will bring
5 them up separately one by one and you will get a
6 chance to ask them individual questions if you think
7 they are not qualified. But we won't do it on the
8 general jury panel.

9 So I will do the voir dire. We will see
10 who has questions. We will send them out into the
11 hall and bring them back in one by one. If there is
12 something particular on the jury information sheets
13 that you get and you want to ask some specific
14 questions to, I may permit you to do that as long as
15 we don't go overboard. So you get a chance to ask,
16 I think, what you want to ask. All right.

17 Generally it's a formal atmosphere in
18 here. Please make sure that your clients and anyone
19 associated with you know to stay clear of the jury,
20 no amenities, no hellos, no good mornings, and I
21 will tell them that as well.

22 It will be a jury of seven out of a panel
23 in play, we will probably have about 25 or so people
24 here, but the actual number in play at any given
25 time is 13. So with three strikes each and a jury

1 of seven, that's what you're looking at. It doesn't
2 mean we won't ask the other people questions, but
3 just so you know, you each get three strikes and to
4 land with a jury of seven.

5 We will go from eight to five. As I
6 understand it, there's not anticipation that this
7 case will last longer than this week. Is that
8 correct, Mr. Radbil?

9 MR. RADBIL: Correct.

10 MS. MALONE: It should be finished
11 tomorrow, Judge, but -- no later than Wednesday.

12 THE COURT: Okay. All right. And I will
13 put the liability and damages section -- I mean, I
14 will combine those. I often bifurcate the cases,
15 but I will not do that in this case.

16 So we will start, other than tomorrow, 9
17 to 5, with a break for lunch an hour and 15 minutes,
18 somewhere between a 15- and 20-minute break in the
19 morning and afternoon.

20 Those are generally the instructions. We
21 will talk more specifically tomorrow. I will have
22 you question the witnesses from the lectern. Please
23 ask to approach the witness if you need to approach
24 them. Any preadmitted exhibits can be referred to
25 without any kind of predicate obviously.

1 Do you have any specific questions,
2 Mr. Radbil?

3 MR. RADBIL: Yes. Regarding procedure for
4 nonpreadmitted exhibits, how would you like those
5 offered?

6 THE COURT: Just lay your predicate --
7 assuming it's not one that's been ruled out or
8 mentioned, lay your predicate and offer it, and we
9 will find out if there's an objection and I will
10 make a ruling.

11 MR. RADBIL: As far as publishing exhibits
12 to the jury.

13 THE COURT: You can publish your exhibits.
14 Here's the problem with publishing. If you publish
15 them right before you turn the witness over to the
16 other side, I won't make her start nor will I make
17 you start until the jury has looked at them, because
18 it's distracting. I wouldn't publish it while
19 you're talking because they are looking at the
20 exhibits and not listening to you. So you can
21 publish them with permission of the Court, but,
22 again, if it's right before the other side gets it,
23 I'm going to let them look at it before she has to
24 ask questions.

25 MR. RADBIL: The specific concern I had

1 was the account notes. When I question Mr. Wyatt,
2 the corporate representative, I would like to have
3 those exhibited so we can point to precise entries
4 on those account notes because they are fairly
5 detailed.

6 THE COURT: Do you have some kind of
7 device to pull the exhibits up?

8 MR. RADBIL: No, but I can bring in a
9 projector.

10 THE COURT: Well, if you publish the
11 exhibit, there's only going to be one, so I'm not
12 sure how you will refer specifically. I usually
13 admonish the jury that, if they can't see a exhibit
14 discussed, that they will get the exhibits back in
15 the jury room. If you have some ability to use an
16 elmo or something, you can use that to try to
17 explain it to them as you go.

18 MR. RADBIL: Okay.

19 THE COURT: All right. Anything else?

20 MR. RADBIL: Questioning strictly from the
21 lectern, which will be here?

22 THE COURT: Yes.

23 MR. RADBIL: And no wandering?

24 THE COURT: No wandering. Any objections
25 should be legal objections, not speaking objections.

1 You both know what that means.

2 MR. RADBIL: Could you clarify, please?

3 THE COURT: Don't object: Your Honor,
4 this witness knows this isn't true because I told --
5 they told me last week during deposition, that kind
6 of thing. It's just hearsay or --

7 MR. RADBIL: Foundation.

8 THE COURT: Yes. Ms. Malone?

9 MS. MALONE: The only thing I have, Judge,
10 is a simple housekeeping thing. When I was going
11 through my exhibit binder for the Court and the
12 extra one for the witness, I noticed that they had
13 inadvertently put the back of a document on page 8.
14 And I'm concerned that maybe they did the same thing
15 with your exhibit binder. So I was -- just if you
16 want, I could give you this one so you will know
17 which one needs to be removed.

18 THE COURT: That's fine. I don't have the
19 binders in front of me.

20 MS. MALONE: It's the last page on
21 Exhibit 8. And it may not be on yours. It was just
22 in the other one.

23 THE COURT: You want to take a look at it,
24 Mr. Radbil?

25 MR. RADBIL: I would. Is it a letter?

1 MS. MALONE: It was a phone record, and
2 this was inadvertently copied on the back of it.
3 It's not intended to be part of the exhibit.

4 MR. RADBIL: I think this is plaintiff's
5 12, right?

6 MS. MALONE: Probably, but it's not part
7 of my Exhibit 8. I'm trying to fix my exhibit.

8 MR. RADBIL: Oh, your binder.

9 MS. MALONE: Yes, not your binder.

10 THE COURT: All right. Counsel, be sure
11 to address the issue of preadmitted exhibits.
12 Please be here by 9:30. Anything else?

13 MS. MALONE: Anything about the charge you
14 would like for us to try to address, Judge?

15 THE COURT: Not this afternoon.

16 MS. MALONE: I meant between us.

17 THE COURT: Yes, if you all can come
18 together on an agreed charge, that's the ultimate
19 result that I would seek. So if you can get
20 together today and even tomorrow on at least some
21 proposal for an agreement. And again, I don't
22 submit special issues in federal court. I don't
23 submit interrogatories to the jury. It's simply
24 going to be a discussion of the general rules of
25 jury trials, burden of proof. We will show

1 specifically what the cause of action is here, the
2 elements of proof, and then a question as to whether
3 or not the plaintiff has met his burden of proof of
4 establishing liability as explained in the charge.
5 That's generally what we are talking about.

6 MR. RADBIL: So there really is no room
7 for negotiation, it's going to be the elements and
8 then the standard introduction?

9 THE COURT: As opposed to?

10 MR. RADBIL: Anything else. Seems like
11 there's not much room for negotiation because it's
12 going to be that standard.

13 THE COURT: There's a lot of room for
14 negotiation. What I mean by that is, if you can
15 agree to a charge, that's great. If you can't, you
16 can't, and we will have to go back to the drawing
17 board and figure it out. I don't know what else to
18 say. You think you can come to an agreement on the
19 jury instructions?

20 MS. MALONE: No.

21 MR. RADBIL: If I understood your format
22 correctly, the only discussion would be about the
23 elements of the cause of action, which are, I think,
24 pretty plainly established, not established by the
25 evidence, but in the law.

1 THE COURT: That's partially correct, but
2 I can't speak for you as a lawyer because I don't
3 know. Lawyers always find issues in jury charges.
4 What I understand you to be asking me is probably
5 correct, yeah.

6 MR. RADBIL: Okay. Would you please, Your
7 Honor, just one time tell me the format so I can be
8 absolutely clear?

9 THE COURT: The proposed jury
10 instructions?

11 MR. RADBIL: Yes.

12 THE COURT: Do you have a copy of the
13 Federal 5th Circuit --

14 MR. RADBIL: Of course.

15 THE COURT: -- instructions. Well, they
16 are generally like that. And I don't know if I have
17 anything I could give you to look at. Let me see.
18 If you will wait a minute, I will see if I have any
19 instructions. I don't have any Fair Debt Collection
20 Practices jury instructions, but it would help to
21 come to an agreement. Let me see if I can find
22 something to give you, generally speaking.

23 MR. RADBIL: Sure.

24 MS. MALONE: Your Honor, in Mr. Radbil's
25 proposed charge, he has these whole long sections

1 about the purpose of the FDCPA, that Congress set
2 out these individuals to be private attorney
3 generals. And it goes on and on about how evil debt
4 collectors are, literally. That kind of comment is
5 what I typically have concerns about with regard to
6 him.

7 We have done a similar charge that was
8 submitted to Judge Furgeson. We actually didn't go
9 to trial, but we had worked out a similar charge.
10 And also I did one with Judge Hoyt that I think is
11 consistent in the Southern District. But I don't
12 think that Mr. Radbil necessarily agrees that the
13 Texas one is much more streamlined than what -- he
14 does a national practice; apparently they can do
15 other things in other states.

16 THE COURT: Okay.

17 MR. RADBIL: And I will respond by saying,
18 I don't agree normally with the legal elements of
19 the claims that are stated in jury instructions
20 proposed by Ms. Malone.

21 And I agree that under Your Honor's format
22 none of the -- well, it seems like none of the
23 policy stuff would come in, it would just be basic,
24 here are the elements of the cause of action after
25 the 5th Circuit Pattern Jury Charge and then simple

1 questions.

2 THE COURT: Right. There would be no
3 policy discussion in there. And if Ms. Malone has
4 done them before for Judge Furgeson and Judge Hoyt
5 on these particular areas of law, that's probably
6 going to be a lot more helpful to you than anything
7 I have done on another area. So I would rather not
8 confuse you by giving you something that would not
9 be related to the underlying cause of action here.

10 Anything else, Counsel? We will see you
11 tomorrow at 9:30.

12 (Court in recess at 4:44 p.m.)
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C E R T I F I C A T E

I, Shawnie Archuleta, CCR/CRR, certify
that the foregoing is a transcript from the record
of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees
format comply with those prescribed by the Court and
the Judicial Conference of the United States.

This 21st day of March 2013.

s/Shawnie Archuleta
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The Northern District of Texas
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